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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

DERRICK CHAPMAN,

Cross-complainant, Cross-Defendant
and Appellant,

v.

MYRTLE POTTER,

Cross-defendant, Cross-complainant
and Respondent.

H032163

(Santa Clara County
Super. Ct. No. CV083034)

I. INTRODUCTION

After they met at a real estate investors' meeting, appellant Derrick Chapman and respondent Myrtle Potter began a personal relationship and started several businesses together. Two years later, the parties' personal relationship ended and disputes arose over the operation of their businesses.

Potter brought a derivative action against Chapman individually and their business entities as nominal defendants in which she sought injunctive relief, an accounting, declaratory relief, and damages for Chapman's alleged breach of fiduciary duty. Chapman responded by filing a cross-complaint against Potter for breach of contract, an accounting, and injunctive relief. Chapman's cross-complaint also included several tort claims and a claim for palimony.

In turn, Potter filed a cross-complaint against Chapman and their business entities, asserting various tort claims against Chapman, breach of contract as to the business entities, and claims for declaratory relief and constructive trust as to all cross-defendants. Chapman then filed a special motion to strike Potter's cross-complaint under Code of Civil Procedure section 425.16,¹ which provides for dismissal of unsubstantiated lawsuits based on claims arising from the defendant's constitutionally protected speech or petitioning activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60 (*Equilon*)). The trial court denied the motion on the ground that Chapman had failed to demonstrate that Potter's cross-complaint arose "from an act in furtherance of his right of petition or free speech in connection with a public issue."

On appeal, Chapman argues that the trial court erred because Potter's cross-complaint is based upon the allegations made in his cross-complaint. Having performed our independent review, we conclude for the reasons stated below that the trial court properly denied the motion to strike the cross-complaint under section 425.16 and therefore we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

On April 6, 2007, Potter filed her first amended complaint for derivative and declaratory relief (hereafter the complaint). The named defendants are Chapman and Steel Components USA, Inc. The nominal defendants include Chapman & Associates, LLC; Chapman Investment Group, LLC; Chapman Property Management, Inc.; Chapman Builders, Inc.; and Chapman Development Group, Inc. (hereafter the Chapman Entities).

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

The factual allegations in the complaint included the following account of the parties' involvement with each other. Potter and Chapman met in February 2005 at a meeting for real estate investors and shortly thereafter began a personal and business relationship. In March 2005 Potter and Chapman formed Chapman & Associates, a real estate investment business and the first of the Chapman Entities. The operating agreement for Chapman & Associates provides that Potter and Chapman each have "a 50% Percentage Share Value" in the company and " 'shall collectively control the management and direction of the Company's business.' " The organizational documents for the other Chapman Entities contain similar terms. Funding for the Chapman Entities came from Potter's loans of approximately \$15 million pursuant to promissory notes, primarily to Chapman & Associates for the purchase of real estate, as well as Chapman's loan of \$50,000 to Chapman & Associates.

By December 2006 the parties' relationship had deteriorated and disputes had arisen over the operation of the Chapman Entities. In March 2007 the parties' personal relationship ended and the Chapman Entities were in a financial crisis. Potter believed that Chapman had mismanaged the businesses and had taken a number of steps to damage or destroy them, including, among other things, closing a payroll account, removing company records and files, and removing computer equipment. She also believed that Chapman had taken copies of her personal information, including her asset statement, driver's license, passport, social security number, banking information, and credit card information.

Based on these allegations, Potter asserts causes of action for (1) injunctive relief (enjoining Chapman's participation in the Chapman Entities and use of Potter's personal information and compelling the return of company records); (2) an accounting; (3) breach of fiduciary duty; (4) declaratory relief (a judicial determination of the parties' rights and duties with regard to Steel Components USA); and (5) declaratory relief (a judicial determination that Chapman has no right to use Potter's credit information). In addition

to injunctive and declaratory relief, Potter seeks compensatory damages and attorney fees and costs.

B. *Chapman's Cross-Complaint*

Chapman filed an answer to the complaint and a cross-complaint on May 14, 2007. The cross-complaint included Chapman's account of the parties' involvement with each other and his claims against Potter.

According to Chapman, after the parties met in February 2005 Potter asked him to become her domestic and business partner. She also proposed that they have equal ownership of several prospective business entities that "would bear the surname of 'Chapman' [and] would be the building blocks for the parties' future and their economic relationship." (Capitalization omitted.) After establishing the Chapman Entities, Potter gifted Chapman with a 50 percent ownership interest in each entity. The organizational documents for the Chapman Entities provided that the parties would collectively control the businesses and Chapman would manage the day-to-day operations. Potter also induced Chapman to make a significant financial investment and to resign from his employment with the San Jose Fire Department. When the parties' personal relationship ended in March 2007, Potter seized "*de facto* control" of the Chapman Entities as part of her scheme to exclude Chapman from participating in the ownership, control and management of the Chapman Entities.

Based on these and other allegations, Chapman asserts causes of action for (1) breach of contract (the operating agreement for Chapman & Associates and the oral agreement gifting Chapman with a 50 percent ownership interest in all their businesses); (2) palimony; (3) breach of the implied covenant of good faith and fair dealing; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) an accounting; (7) declaratory relief (a judicial determination that Chapman is a 50 percent owner of the Chapman Entities); (8) breach of fiduciary duty; (9) defamation; (10) conversion; (11) injunctive relief (enjoining Potter's unilateral actions as to the Chapman Entities); and

(12) constructive/resulting trust. In addition to injunctive and declaratory relief, Chapman seeks compensatory damages, punitive damages, and attorney fees and costs.

C. Potter's Cross-Complaint

On June 18, 2007, Potter answered Chapman's cross-complaint and filed a cross-complaint against Chapman and Steel Components USA and nominal cross-defendants the Chapman Entities.

In its "preliminary statement," the cross-complaint states that "[t]hese claims are made in response to those cross-claims Chapman raised in response to Potters' April 7, 2007 [complaint]. Chapman's cross-claims included claims unrelated to the derivative claims Potter asserted in the [complaint]." In particular, Potter disputes Chapman's claim that she had gifted loans of more than \$18 million to him or to the Chapman Entities, and asserts that she had made the loans with the expectation that she would be paid in full. Potter also asserts that Chapman took possession of her personal laptop computer without her permission and reviewed its contents, misappropriated company funds to pay his personal expenses, and refused to tender rental payments from tenants of three properties held by the parties as joint tenants.

Based on these allegations, the cross-complaint asserts causes of action for (1) intentional misrepresentation (Chapman never intended to honor his promise that Potter's loans to the Chapman Entities would be repaid with interest); (2) negligent misrepresentation (same); (3) breach of contract (against all cross-defendants except Chapman for failure to repay Potter's loans); (4) conversion (Chapman took possession of Potter's laptop without her permission); (5) declaratory relief (judicial determinations that the laptop is Potter's personal property, Chapman & Associates is the owner of the properties conveyed to the parties as joint tenants, Chapman has no individual interest in the properties, Chapman may not encumber or transfer his interest in the properties, and the funds provided by Potter were loans to be repaid with interest); (6) constructive trust (Chapman is an involuntary trustee as to the laptop and the properties conveyed to the

parties as joint tenants); (7) quantum meruit (Chapman owes Potter compensation for the sums she paid to cover the personal expenses that Chapman arranged for the Chapman Entities to pay); and (8) intrusion (Chapman intruded upon Potter's privacy by reviewing the data stored on her laptop).

Potter seeks compensatory damages, punitive damages, and injunctive and declaratory relief by way of her cross-complaint.

D. Chapman's Section 425.16 Special Motion to Strike Potter's Cross-Complaint

On July 23, 2007, Chapman filed a special motion to strike Potter's cross-complaint pursuant to section 425.16 and a demurrer.² He argued that the cross-complaint should be struck because it was based upon Chapman's "assertions in his Cross-Complaint against [Potter]." Specifically, Chapman argued that the causes of action for intentional and negligent misrepresentation were "based solely upon [Chapman's] assertions in his Cross-Complaint."

Chapman also contended that Potter could not establish a probability of prevailing on her cross-complaint because the cross-complaint was procedurally improper and her cross-claims were barred by the litigation privilege (Civ. Code, § 47, subd. (b)) and unsupported by admissible evidence. Additionally, Chapman submitted a declaration dated August 29, 2007, in which he denied making any misrepresentations to Potter or defrauding her.

In her opposition to the motion, Potter contended that section 425.16 did not apply to her cross-complaint because it was "based on private misrepresentations and conduct that occurred before this litigation was commenced," and not upon "the exercise of a right to petition or free speech on an issue of public interest." Potter also contended that she had established a probability of prevailing on her cross-complaint, as demonstrated

² Chapman withdrew his demurrer on August 28, 2007.

by the evidence she had submitted in connection with the applications for temporary restraining orders and requests for preliminary injunctions.³ Further, Potter disputed Chapman's argument that the cross-complaint was barred by the litigation privilege or was improper. She explained that her cross-complaint included mandatory cross-claims in response to Chapman's cross-claims, pursuant to section 426.30, subdivision (a).⁴ Finally, Potter sought an award of attorney fees pursuant to section 425.16, subdivision (c)⁵ on the ground that the motion was frivolous and calculated to cause unnecessary delay.

E. The Trial Court's Order

The trial court denied Chapman's special motion to strike Potter's cross-complaint on September 11, 2007. The order states, "Chapman has failed to demonstrate that the challenged cause of action is one arising from an act in furtherance of his right of petition or free speech in connection with a public issue. ([§] 425.16, subd. (b)(1).) Potter's Cross-Complaint arises from alleged conduct and misrepresentations that Chapman made long before the commencement of this lawsuit, not from the allegations in Chapman's Cross-Complaint." The court denied Potter's request for attorney fees.

³ The record reflects that the orders granting Potter injunctive relief in this matter include, among others, a May 15, 2007 preliminary injunction and a October 11, 2007 order modifying the preliminary injunction.

⁴ Section 426.30, subdivision (a) provides, "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his [or her] answer to the complaint he [or she] has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded."

⁵ Section 425.16, subdivision (c) provides in part, "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5."

III. DISCUSSION

On appeal, Chapman challenges the trial court's order denying his section 425.16 special motion to strike Potter's cross-complaint. We will begin our evaluation by reviewing the legal framework that governs a motion under section 425.16 and the applicable standard of review.

A. Legal Framework

The anti-SLAPP statute, section 425.16, was enacted in 1992 in response to a "disturbing increase" in lawsuits brought for the strategic purpose of chilling a defendant's rights of petition and free speech. (§ 425.16, subd. (a).) SLAPPs (strategic lawsuits against public participation) are unsubstantiated lawsuits based on claims arising from defendant's constitutionally protected speech or petitioning activity. (*Equilon, supra*, 29 Cal.4th at p. 60; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*.) The anti-SLAPP statute provides a means for the trial court to evaluate the merits of a possible SLAPP "using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Under the procedure authorized in the statute a defendant can stay discovery before litigation costs mount, obtain early dismissal of the lawsuit, and recover attorney's fees. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197-198.)

Section 425.16 applies to any cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" (§ 425.16, subds. (b)(1), (e)(4).) The stated purpose of section 425.16 is to encourage protected speech by permitting a court to promptly dismiss unmeritorious actions or claims that are brought "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) In order to achieve these ends, a 1997 amendment to the statute added the proviso that the statute "shall be construed broadly." (§ 425.16, subd. (a), as amended by Stats. 1997,

ch. 271, § 1; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279 (*Soukup*).)

A defendant seeking the protection of the anti-SLAPP statute has the burden of making the initial showing that the lawsuit arises from conduct “in furtherance of [a] person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” (§ 425.16, subds. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at p. 88.) The statute describes four categories of conduct that will qualify: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

When the defendant’s alleged acts fall under subdivisions (e)(1) or (e)(2) of section 425.16, defendant is not required to make a separate showing that the matter is “an issue of public interest,” as is necessary under subdivisions (e)(3) and (e)(4). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1123 (*Briggs*).) This is because the concept of what constitutes a public issue is deemed to include speech activity that takes place before, during, or in connection with an “official proceeding authorized by law.” (§ 425.16, subd. (e)(1), (e)(2); *Briggs, supra*, 19 Cal.4th at pp. 1116-1117.)

Once the defendant shows that the plaintiff’s claim arises from one of the section 425.16, subdivision (e) categories of protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1);

Navellier, supra, 29 Cal.4th at p. 88.) Thus, “ ‘[s]ection 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.] ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

B. The Standard of Review

“ ‘Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider “the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation].’ [Citation.]” (*Flatley, supra*, 39 Cal.4th at pp. 325-326; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672.)

C. Analysis

In his opening brief, Chapman argues that Potter’s cross-complaint falls within the ambit of section 425.16 because the cross-complaint “alleges Intentional and Negligent Misrepresentation against [Chapman] based solely upon [the] assertion in [Chapman’s] Cross-Complaint that Potter ‘gifted’ him the monies to purchase the properties owned by the Chapman Entities. Potter alleges that she ‘loaned’ the monies to purchase the properties owned by the Chapman Entities and, thus, claims that Chapman[’s] assertion[s] in his Cross-Complaint that the monies were ‘gifted’ are misrepresentations. [¶] [Potter] is barred from using Chapman[’s] assertions in his Cross-Complaint as the

basis of her Cross Cross-Complaint.” Chapman also argues that section 425.16 is applicable because the case involves a matter of public interest.

In response to his argument, Potter contends that Chapman failed to make the threshold showing under section 425.16 that her cross-complaint asserts causes of action arising from his acts in furtherance of his right of petition or free speech. Potter contends that “[n]one of the *activities* at issue in [her] cross-complaint—addressing Chapman’s false promise to repay Potter’s loans with interest, his wrongful possession of her computer, the ownership of real property parcels, or the improper use of business funds—arise from Chapman’s exercise of his right to petition or to free speech. The activities at issue arise from Chapman’s deceit and mismanagement of business entities that occurred long before he filed his cross-complaint against Potter.”

Our resolution of the issue is governed by the provisions of section 425.16 and California Supreme Court authority. As we have noted, section 425.16 applies to any cause of action against a person “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” (§ 425.16, subds. (b)(1), (e)(4).) Therefore, “[i]n the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.]” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).)

Section 425.16, known as “[t]he anti-SLAPP statute, . . . treats complaints identically with cross-complaints (§ 425.16, subd. (h).” (*City of Cotati, supra* 29 Cal.4th at p. 77.) Thus, “[a]lthough a cross-complaint may be subject to a section 425.16 motion, not all cross-complaints would qualify as SLAPP suits. . . .” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 633-634, disapproved on other grounds in *Equilon, supra*, 29 Cal.4th at p. 63, fn.5.) To determine whether a section 425.16 motion satisfies the threshold requirement that the complaint or cross-complaint arises from an act in furtherance of the person’s right of petition or free speech, “a court considers ‘the

pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).)” (*City of Cotati, supra*, 29 Cal.4th. at p. 79.)

A section 425.16 motion to strike a cross-complaint is insufficient if it is based upon the contention that the cross-complaint arises from the causes of action in response to which the cross-complaint is pleaded. (*City of Cotati, supra*, 29 Cal.4th at p. 77.) “[T]o suggest that all cross-actions arise from the causes of action in response to which they are pled would contravene the statutory scheme governing cross-complaints. (See [§] 426.10, subd. (c) [defining ‘related cause of action’]; *id.*, § 426.30 [compulsory cross-complaints]; *id.*, § 428.10 [permissive cross-complaints].)” (*Ibid.*)

In short, “[a] compulsory cross-complaint on a ‘related cause of action’ against the plaintiff ([§] 426.30, subd. (a)) would rarely, if ever, qualify as a SLAPP suit arising from petition activity. By definition, a ‘related cause of action’ is ‘a cause of action which *arises out of the same transaction, occurrence or series of transactions or occurrences as the cause of which the plaintiff alleges in his [or her] complaint.*’ (§ 426.10, subd. (c). . . .) The SLAPP suit is not ‘related’ to the transaction or occurrence which is the subject of the plaintiff’s complaint, but arises out of the litigation process itself.” (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 651.)

Thus, in *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, a construction company’s motion to strike a city’s cross-complaint as a SLAPP under section 425.16 was properly denied where the cross-complaint asserted causes of action arising from the construction company’s “bidding and contracting practices, not from acts in furtherance of its right of petition or free speech.” (*Id.* at p. 929.) Similarly, in *Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82, an insurer’s section 425.16 motion to strike its insured’s bad faith complaint was properly denied because the bad faith allegations concerned the insurer’s delay in

resolving its insured's claim and did not relate to the insurer's exercise of the right to petition. (*Id.* at p. 94.)

In the present case, we determine that Chapman failed to meet his burden to make the threshold showing that Potter's cross-complaint arises from conduct "in furtherance of [a] person's right of petition or free speech under the United States or California Constitution in connection with a public issue" (§ 425.16, subs. (b)(1), (e)(4); *Navellier, supra*, 29 Cal.4th at p. 88.) Our independent review of the pleadings indicates that Potter's cross-complaint generally arises from the "same transaction, occurrence or series of transactions or occurrences" (§ 426.10, subd. (c)) as the causes of action that Chapman asserts in his cross-complaint, including the parties' involvement with each other and with the Chapman Entities and their various related business, financial and real property transactions. None of Potter's allegations in her cross-complaint arises from any acts by Chapman in furtherance of his right to petition or free speech.

We also find no merit in Chapman's argument that "[Potter] is barred from using Chapman['s] assertions in his Cross-Complaint as the basis of her Cross Cross-Complaint." As we have discussed, a section 425.16 motion to strike a cross-complaint cannot be based upon the contention that the cross-complaint arises from the causes of action in response to which the cross-complaint is pleaded. (*City of Cotati, supra*, 29 Cal.4th at p. 77.)

Chapman's reliance upon the decision in *Navellier, supra*, 29 Cal.4th 82 is similarly unavailing. While the *Navellier* court ruled that the defendant had "met his threshold burden of demonstrating that plaintiffs' action is one arising from the type of speech and petitioning activity that is protected by the anti-SLAPP statute," the facts of that case are distinguishable. (*Id.* at p. 95.) In *Navellier*, the defendant was "being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls

squarely within the ambit of the anti-SLAPP statute's 'arising from' prong. [Citation.]" (*Id.* at p. 90, fn. omitted.) Here, in contrast, Potter's claims as set forth in her cross-complaint are based upon the parties' personal and business affairs, and not upon the filing of Chapman's cross-complaint.

For these reasons, we conclude that Potter's cross-complaint is not subject to a special motion to strike under section 425.16 because the cross-complaint does not arise from the petitioning and speech activity that is protected by section 425.16. The trial court therefore did not err in denying Chapman's special motion to strike the cross-complaint.

Having reached this conclusion, we need not address either Chapman's contention that Potter has not demonstrated a probability of prevailing on her cross-complaint pursuant to section 425.16, subdivision (b)(1) or Potter's contention that Chapman's opening brief should be stricken or disregarded for violating California Rules of Court, rule 8.204(a)(1)(C) by failing to include citations to the record.

IV. DISPOSITION

The September 11, 2007 order denying appellant Derrick Chapman's special motion to strike respondent Myrtle Potter's cross-complaint is affirmed. Costs on appeal are awarded to respondent.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MCADAMS, J.

DUFFY, J.